United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1061 B

P/S

To be argued by
PAUL E. COFFEY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1061

UNITED STATES OF AMERICA,

Appellee,

—v.—

DANIEL VALERIANO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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Preliminary Statement

An investigation into probable federal gambling violations led to court-authorized interceptions of the wire communications of Daniel Valeriano and four others during the period of January 17, 1973 to January 27, 1973. In a sworn affidavit before United States Magistrate Arthur Lattimer, F.B.I. Special Agent Raymond Connelly stated that these interceptions and other facts furnished the probable cause for search warrants. Four such warrants were issued and executed on July 16, 1973. Valeriano moved for return of the property seized/or to suppress the seized property. As he was not yet indicted, appellant moved pursuant to Federal Rules of Criminal Procedure 41(e), as amended. This motion was denied.

Appellant contended in his motion to suppress that a belated notice of inventory and the absence of a notice under Section 2518(9), Title 18, United States Code denied

him the opportunity to test the validity of the wiretap and of the search and seizure. He pursues these contentions on appeal, and adds a third argument that he was denied due process of law.

Statement of Facts

On January 15, 1973, an order for the interception of wire communications was signed by the Honorable Thomas F. Murphy, United States District Judge for the District of Connecticut. This wiretap order authorized interceptions for a fifteen day period to aid in the investigation of federal gambling violations. Interceptions were made during the period of January 17, 1973 through January 27, 1973. During the application procedure, Judge Murphy directed that all applying wiretap papers and orders, stenographic notes and related documents be sealed until further Court order.

The appellant was served with a notice of the wiretap authorization by mail on July 10, 1973, pursuant to 18 U.S.C. § 2518(8)(d). On July 16, 1973, Special Agent Raymond Connolly, F.B.I., filed an affidavit with the United States Magistrate Arthur Lattimer in New Haven, Connecticut, stating that the wiretap interceptions, together with informant information and personal observations, supplied the probable cause to believe that an illegal gambling business was being conducted by the appellant and others. Based on Agent Connolly's belief that evidence of the illegal gambling business could be found on the person of Daniel Valeriano, at his residence, 58 Dixwell Avenue, New Haven, Connecticut and in his 1973 Cadillac, Magistrate Lattimer authorized four search warrants.

Later that same day, July 16, 1973 the search warrants were executed at the 11 Simsbury Street address. Both Valeriano and his 1973 Cadillac were present at this address. The search of the 11 Simsbury Street premises

was first executed, whereupon Agent Connolly seized what he recognized to be gambling records in the kitchen. Valeriano was present at this time. Connolly then executed the warrant for Valeriano's person, which produced $294 in U.S. currency. The 1973 Cadillac was also seized pursuant to warrant. Copies of the search warrants were left with the appellant. The return of each warrant along with the inventory of the property seized were filed on July 18, 1973.

The appellant moved for the return of all property seized and to suppress such evidence under Federal Rules of Criminal Procedure 41(e), on September 17, 1973. He had not yet been indicted. The hearing on this motion was held on October 1, 1973. Testimony was heard on the two evidentiary issues presented by the defendant: (1) that improper notice of inventory was given to defendant thereby invalidating the search warrant; (2) that denial of ten-day notice of use of wiretap information in an affidavit violated 18 U.S.C. § 2518(9) and precluded him the opportunity of testing the validity of the probable cause for the search warrant. The defendant's motion was denied on November 28, 1973.

On May 3, 1974, the defendant and six other persons were indicted in Hartford, Connecticut before a Special Grand Jury for conducting an illegal gambling business in violation of 18 U.S.C. § 1955, and for conspiring to commit this illegal gambling business in violation of 18 U.S.C. § 371. On May 21, 1974, the Government moved that all sealed wire interceptions papers be unsealed to include extensions of inventory notice, and all sealed stenographic notes be transcribed, pursuant to 18 U.S.C. §§ 2518(8)(b) and 2518(8)(d).

All wiretap papers, documents, taped communications, orders applications and extensions are now available to the appellant to challenge fully the validity of the wiretap authorization, as well as the validity of the search and seizure in the District Court below.

ARGUMENT

I.

A Motion Under Rule 41(e) of the Federal Rules of Criminal Procedure Lacks the Independence of Standing Which Would Allow the Aggrieved Party an Immediate Appeal.

Appellant challenges the ruling below denying his Motion for Return of Seized Property and the Suppression of Evidence. The District Court's ruling is not only correct, however, but this Court lacks appellate jurisdiction at this time to consider any alleged error in the ruling.

The United States Courts of Appeal have statutory jurisdiction over all *final* decisions of the United States District Courts. 28 United States Code, Section 1291. Appellant contends that the District Court's order denying his motion is "functionally final" and appealable.[1] However, only those orders relating to a criminal case which "possess sufficient independence from the main course of the prosecution to warrant treatment as plenary orders" are appealable under § 1291. *Carroll* v. *United States,* 354 U.S. 394, 403 (1957). *See also, United States* v. *King,* 482 F.2d 768 (D.C. Cir. 1973). Unless special legislation or exceptional circumstances exist, a motion under Rule 41(e) lacks the separable and independent standing which would allow the party aggrieved by the ruling on the motion an immediate appeal.

No special legislation exists which grants the defendant an immediate review of the District Court's ruling. Rule 41(e) permits a person aggrieved by an unlawful search and seizure to move for return of the property. It does

[1] See appellant's brief, at p. 10.

not give the unsuccessful movant a right to appeal. While it is true that exceptional circumstances can turn an otherwise unappealable interlocutory order into a final order ripe for appeal, no such circumstances are present here. For such an order to be deemed final and appealable, it must first meet three characteristics: "(1) it must be separable from, and collateral to, the main cause of action; (2) the right involved must be too important to be denied review; and (3) the question presented must be such that, if review is postponed until final determination of the case, the claimed right will be irreparably lost." *United States* v. *Lansdown*, 460 F.2d 164, 170-71 (4th Cir. 1972), paraphrasing *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949). *See also, United States* v. *Ryan*, 402 U.S. 533 (1971).

The present case satisfies none of these characteristics. The ruling on the defendant's motion is neither separable from nor collateral to the main cause of action. This Court, in *Bova* v. *United States*, 460 F.2d 404 (2d Cir. 1972), dismissed an appeal for lack of appellate jurisdiction. Three persons whose telephone communications were intercepted pursuant to court order appealed from a District Court order denying their motion to suppress the communications. The wiretap information furnished the basis for questions presented to the three persons before the grand jury. These motions remained undecided until after the grand jury returned an indictment, which indictment was not against those three witnesses. It seems obvious that if any order should be considered separable and independent from the main cause of action for lack of jurisdiction, this was the case. Cf. *Go-Bart Co.* v. *United States*, 282 U.S. 344, 356 (1931) (where court order denying the return of seized property was held final and appealable as to the company which was not named in the warrant or complaint and was a stranger to the proceedings.)

In *DiBella* v. *United States,* 369 U.S. 121 (1962) the Supreme Court reversed the Second Circuit's holding that the order was appealable because the motion was filed before the return of the indictment. Prior Supreme Court decisions had recognized appeals from orders granting and denying pre-indictment motions which were the basis of the rule of appealability developed in this Circuit. *See Carroll* v. *United States,* 354 U.S. 394, 403 (1957); *Cobbledick* v. *United States,* 309 U.S. 323, 328-29 (1940); *Go-Bart Co.* v. *United States,* 282 U.S. 344, 356 (1931); *Cogen* v. *United States,* 278 U.S. 221, 225 (1929); *Perlman* v. *United States,* 247 U.S. 8 (1918). The Court in *DiBella* stated:

> (T)he mere circumstance of a pre-indictment motion does not transmute the ensuing evidentiary ruling into an independent proceeding begetting finality even for purposes of appealability . . . When at the time of the ruling there is outstanding a complaint, or a detention or release on bail following arrest, or an arraignment, information, or indictment—in each case the order on a suppression motion must be treated as "but a step in the criminal case preliminary to the trial thereof" (citation omitted). Only if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent, (citations omitted). *DiBella supra,* at 131-32.

Although this quotation does not expressly include the seizure of property pursuant to probable cause based on a Court authorized wiretap within the "steps in a criminal case preliminary to the trial," *DiBella* was only presented with the factual situation where the movant had been arrested and arraigned. It is contended that the *DiBella* opinion can be extended to include property seized pursuant to Court authority.

This is the impression left by this Court in *Bova* v. *United States,* 460 F.2d 404 (2d Cir. 1972). As previously stated, that case involved a pre-indictment motion to suppress wiretap communications. In dismissing the appeal on the order denying the motion, this Court stated that it was not the intention of Congress to confer a right to appeal on an unsuccessful movant when 18 U.S.C. § 2518 of Title III of the Onmibus Crime and Control and Safe Streets Act of 1968 was enacted. Congress did consider the appealability issue as evidenced by § 2518(10)(a) and (b). Section 2518(10)(b) governs the Government's right to appeal from an unfavorable ruling. However, § 2518 (10)(a) is silent as to an aggrieved person's right to appeal from an unfavorable ruling on his motion to suppress. Based on this silence in the statute and in the legislative history, the inference is strong that an unsuccessful movant is not given a right to appeal beyond prior court interpretations in *DiBella.* This Court further stated that the existence of a civil remedy for damages in 18 U.S.C. § 2520 for the victim of illegal interceptions also supports this inference. *Bova, supra,* 407-408; S. Rep. No. 1097, 90th Cong., 2d Sess. 107 (1968); ALI Model Code of Pre-Arraignment Procedures Tentative Draft No. 3 SS 7.03 (April 1970). *See also Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 395-96 (1971).

Applying the holdings of *DiBella* and *Bova,* the appeal at bar does not involve a proceeding independent of the now existing indictments against the defendant. The seizure of property was pursuant to court order upon a finding of probable cause resulting from Court-authorized wire interceptions. The subsequent indictments were predicated on the property seized, as well as on the intercepted communications, making the seized property an integral and essential part of the indictments. Without the Court-ordered seizure, it is unlikely that sufficient evidence could

have been acquired to institute criminal proceedings against the defendant. *See Perial Amusement Corp.* v. *Morse,* 482 F.2d 515, 522 (2d Cir. 1973). As the order is not separable from the main cause of action, it is not final or appealable *Cohen, supra,* 546-47.

II.

There Has Been No Denial of Due Process of Law Where Property Was seized Pursuant to Rule 41.

Appellant contends that the above-described search and seizure denied him due process of law and denied him a full hearing on the issue of the legality of the search and seizure. We disagree with this contention.

Rule 41 of the Federal Rules of Criminal Procedure prescribe the procedures for the issuance of a search warrant and the means by which a person aggrieved by an unlawful search and seizure may seek redress. A search warrant may be issued only upon sworn affidavit that probable cause exists for a belief that the property to be seized is designed or intended for use or is or has been used as the means of committing a criminal offense. Federal Rules of Criminal Procedure 41(a), (b), (c).

On July 16, 1973, an affidavit sworn to by Special Agent Raymond Connolly, Federal Bureau of Investigation, before United States Magistrate Arthur Lattimer in New Haven, Connecticut, was filed setting forth probable cause to believe evidence of illegal gambling equipment could be found at particularly designated places and on particularly named persons. *See* attached affidavit, Exhibit A. Four search warrants were duly authorized, and execution of the warrant was carried out the same day.

One of the search warrants was for the search of the defendant's person. Special Agent Connolly possessed the original warrant which was captioned *"United States* v. *Daniel Valeriano,"* naming and describing him as the person to be searched. Following a search of the appellant's person, a copy of this warrant was left with him and the original and an inventory of property seized was filed. The copy left with the appellant contained the above-stated caption and indicated that a person was to be searched, but omitted the person's name and description. He now contends that this omission in the warrant is a fatal defect requiring suppression of the property seized. Agent Connolly described the appellant, however, both in his search warrant affidavit and in the original warrant, which Connolly possessed, and identified the defendant prior to searching him. The omission of the defendant's name and description in the copy has been explained in the hearing below before Judge Jon O. Newman as an administrative or typographical error.

The proper and complete form of the original warrant filed with the Court makes the omission in the copy *de minimis.* No substantial prejudice has been shown by the defendant as a result of the omission.

Moreover, even assuming *arguendo* that the omission substantially prejudiced the defendant, the valid execution of the search warrant of the described premises in defendant's presence and the discovery of numbers records and other gambling paraphernalia comprised sufficient probable cause to subsequently search the person of defendant without a warrant.

The defendant further submits that his property was illegally seized by noncompliance with Rule 41(d) in that a "true and exact" copy of the warrant was not left with him. Rule 41(d) does not require the strict standard of compliance which the defendant urges. The District Court agrees with the United States Government that the defen-

dant's strict standard is not a part of Rule 41(d), and, that absent a showing of prejudice, such errors in the copy left with the defendant do not invalidate the search. *United States* v. *Ramano,* 203 F. Supp. 27, 32 n. 10 (D. Conn. 1972); *United States* v. *Averell,* 296 F. Supp. 1004 (E.D.N.Y. 1969); *United States* v. *Gross,* 137 F. Supp. 244 (S.D.N.Y. 1956).

The defendant claims that he has been prejudiced by the depriviation of his property and by his inability to assert the illegality of both the search and seizure and the electronic wire surveillance in a full hearing The taking of the defendant's property was in accordance with both the Fourth Amendment and Rule 41, as discussed above. The retention of such property by the Government was not a deprivation without due process. The defendant was permitted, under Rule 41(e), a hearing on his claim of illegal search and seizure.

He also claims that he is entitled to a full hearing on the illegality of the electronic wire surveillance, which interceptions furnished portions of the probable cause incorporated into Special Agent Connolly's search warrant affidavit. The wiretap affidavit application, and order, as well as all other papers, extension applications, and related orders and documents were directed to be sealed by the Honorable Thomas F. Murphy, District Judge of the District of Connecticut, pursuant to 18 U.S.C. § 2518(8) (a) and (b). Section 2518(b) provides that disclosure of the papers be made only upon a showing of good cause. The defendant did not move to unseal the wiretap documents. Thus, the appellant cannot claim that he was prejudiced where no hearing on the legality of the wiretap was held. He can, of course, pursue that attack in the District Court at this time.

For these reasons, the defendant was not denied due process of law by the seizure of his property pursuant to a valid search warrant nor by his failure to move to unseal the wiretap documents in order to test their legality.

III.

Suppression and Return of Property Are Not Required Where Statutory Compliance with § 2518(8)(d) is Made and Where No Predudice Resulted by the Exclusion of Two Court Authorized Extensions in the Notice of Inventory.

The defendant contends that the notice of inventory was defective thereby entitling him to suppression of evidence derived from the wiretap. In support, he cites *United States* v. *Eastman,* 465 F.2d 1057 (3d Cir. 1972) as the leading authority on this notice requirement.

Section 2518(8)(d) of Title 18 provides the elements of the inventory of notice to be served on those persons named in the wiretap order or application and on other intercepted parties. The statute states that "not later than ninety days after . . . the termination of the period of an order or extension thereof" such inventory notice shall be served. 18 U.S.C. § 2518(8)(d). The notice must include the date and entry of the authorization order, the fact that wire communications had been intercepted, and the period of the interceptions. There is no requirement that the defendant be notified of court authorized extensions of this ninety day period. Two such extensions were authorized here; the defendant was not notified of them in the inventory notice. Consequently, he contends that the notice of inventory was defective in that it did not include information of these extensions. He cites *United States* v. *Eastman,* 465 F.2d 1057 (3d Cir. 1972), for the proposition that the deliberate waiver of the notice requirement by the issuing judge constitutes prejudice sufficient to justify suppression. This holding is not now in issue. Here, the notice of inventory was not served within ninety days of the termination of the authorized interception because two extensions of time for the required service were obtained by an *ex parte* showing of good cause, as permitted in § 2518

(8)(d). Appellant may now challenge the legality of these extensions in the Court below. This Court, however, is in no position to determine the legality of either the wire interceptions or the extensions of notice since no moving papers were unsealed when this appeal was filed nor are such papers a part of this appeal.

Appellant claims that he was prejudiced by the notice of filing to the extent that he was unable to move to suppress the contents of the wiretap under § 2518(10)(a). He contends that he received the wiretap notice just seven days prior to the search and seizure, which time was insufficient to avail himself of counsel to test the wiretap.[2]

First, he contends that he was denied a timely opportunity to test the validity of the wiretap protections guaranteed in § 2515 and § 2518(5). He believes that § 2518(9) provides this opportunity, but the Government's failure to comply with the ten day notice rule destroyed his opportunity. This contention is a misreading of § 2518(9). As more fully explained in Argument IV, the defendant could move to suppress the wiretap communication as an "aggrieved party" under § 2518(10)(a), not as a "party" to an adversary proceeding under § 2518(9). This method pursuant to § 2518(10)(a) would permit a pre-indictment test of the wiretaps validity. *See Gelbard* v. *United States*, 408 U.S. 41, 79-85 (1972) (J. Rehnquist dissent). Furthermore, the defendant can remedy his alleged grievances civilly by an action pursuant to 18 U.S.C. § 2520. The defendant could also seek pre-indictment relief under 18 U.S.C. § 3504 whereby the aggrieved party can force the government to affirm or deny the occurrence of an illegal wiretap.

Appellant also contends that the access by the Internal Revenue Service to the seized property violates the Fifth Amendment. Where the gambling records and parapher-

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[2] *See* appellant's brief, at p. 19.

nalia were prepared by the defendant, however, under no duress or coercion, they can be used as evidence against him. *United States* v. *White,* 401 U.S. 745 (1971); *Warden* v. *Hayden,* 387 U.S. 294 (1967). In *United States* v. *Iannelli,* 339 F. Supp. 171, 181 (W.D. Pa. 1972), the Court denied the defendant's motion to suppress, stating:

> "It is not difficult to appreciate the similarity between voluntarily maintaining records in the operation of an illegal business or criminal activity in the expectation that they would not be divulged and making incriminating statements to a third party under the same mistaken impression. In neither case is the element of compulsion present and both represent what has been termed as being within an assumption of risk. This type of documentary evidence is not of a purely personal and private nature."

Finally, he expresses concern that the denial of his Rule 41(e) Motion for Return of Property/To Suppress is deemed unappealable and considered *res judicata.* This concern arises from the fact that, generally, "appellate intervention makes for truncated presentation of the issue of admissibility, because the legality of the search too often cannot truly be determined until the evidence at trial has brought all circumstances (of the wiretap) to light." *DiBella* v. *United States,* 369 U.S. 121, 129 (1962). However, the amended Rule 41(e) incorporates the prior practice to favor motions before trial with an evidentiary hearing on disputed issues. Whether judged by the prior practice or by practices under the amended Rule 41(e) or (f), it is commonly accepted that the motion "can, and on occasion must, be renewed at the trial to preserve it for ultimate appeal." *DiBella, supra,* 129-30 n. 9.

Furthermore, as stated above and in Argument IV, appellant has additional means by which to test the legality of the search and seizure and of the wiretap.

IV.

There is No Requirement Which Entitles A Ten (10) Day Notice of the Contents of Intercepted Wire Communications to be Given Prior to the Issuance and Execution of a Search Warrant Premised on Probable Cause Partially Derived From Such Intercepted Contents.

The appellant contends that 18 U.S.C. § 2518(9) must be read to mean that notice of the contents of the intercepted wire communications was required to be given to him not less than ten days before the *ex parte* search warrant proceeding. This contention is erroneous.

Section 2518(9) requires that the ten day notice to be given to "each party" prior to a trial, hearing, or other proceeding in a federal court. The language clearly indicates that the notice must be furnished only to a party in an adversary hearing. An *ex parte* hearing upon a search warrant application is not within this adversary content. If this section was read as the defendant urges, the anomaly results that the subject of the search and seizure would become a necessary party to the search warrant hearing directed against him. This would defeat and frustrate legitimate law enforcement efforts to seize evidence by use of an unannounced search warrant application. Further, such an interpretation would require the presence of those persons named in, or intercepted by implementation of, the wiretap order and application at the "hearings" for additional wire interceptions or extensions of ongoing interceptions. Such a result was hardly anticipated or intended by Congress.

The defendant cites *Gelbard* v. *United States,* 408 U.S. 41 (1972), for support in his interpretation of "proceeding" applicable to an *ex parte* search warrant application.

Gelbard, however, does not address the construction of § 2518(9). The "party" in *Gelbard* was a witness before a grand jury who was facing contempt charges for failure to answer. To compare this adversarial proceeding in *Gelbard* with the *ex parte* search warrant application in the case at bar is extremely incongruous.

The defendant further claims that the denial of a pre-proceeding notice would promote rather than condemn the use of illegality seized evidence to secure indictments. Cf. *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385 (1920). As previously stated, the proper method to test the wiretap order, presently authorized by statute is to move to unseal the wiretap order, application, and related documents and follow with a motion to suppress under § 2518(10)(a). This section provides a remedy for an "aggrieved person" to suppress evidence from an illegal wire interception. "Aggrieved person" is "a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed." *Gelbard, supra,* at p. 59 n. 18, *citing,* S. Rep. 1097, 90th Cong., 2d Sess., 91, 106 (1968).

Hence, the appellant does have an immediate opportunity to test the wiretap order. No new pre-indictment hearing need be, or can be, created or read into the existing statutes. By motion to suppress under § 2518(10)(a), he could have examined and inspected the intercepted communications for a determination of their legality. This remedy is still available to the defendant.

CONCLUSION

It is therefore respectfully submitted that the decision of this Court dismiss this appeal for lack of appellate jurisdiction, or, should this Court deem the lower court's ruling on defendant's Rule 41(e) motion final for appeal purposes, that this Court affirm the District Court's denial of defendant's motion.

Respectfully submitted,

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1061

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Appellant

AFFIDAVIT OF SERVICE BY MAIL

John White, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 297 Sumpter Street Brooklyn. N.Y.

That on the 7th day of June, 1974, deponent served the within Brief upon Anthony J. LaSala, Esq. 205 Church Street New Haven, Connecticut

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me, John White

This 7th day of June 1974

William A. McKaigney

WILLIAM A. McKAIGNEY
Notary Public, State of New York
No. 41-7846700
Qualified in Queens County
Certificate filed in Kings County
Commission Expires March 30, 1976